

May 19, 2003

Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

**Re: In the matter of Rules and Regulations Implementing the Telephone
Consumer Protection Act of 1991, Further Notice of Proposed
Rulemaking
FCC 03-62
GC Docket No. 02-278**

Dear Secretary Dortch:

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits the following reply comments in regard to the Notice of Proposed Rulemaking ("NPRM") in the above captioned matter issued by the Federal Communications Commission ("FCC") on March 25, 2003.¹ As more fully stated below, the Ratepayer Advocate submits that the Do-Not-Call Implementation Act ("Act") must properly balance the competing interests of business with the interest of residential consumers to protect themselves from unwanted telephone solicitations. The choice to determine the types of calls one wishes to receive at home deserves the level of protection intended by the Act, the Federal Trade Commission ("FTC") Telemarketing Rules, and regulations promulgated pursuant to the Telephone Consumer Protection Act of 1991 ("TCPA"). This NPRM seeks to obtain the requisite harmony between these federal enactments, and balance of the competing interests.

In initial comments, the Ratepayer Advocate stated that:

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Further Notice of Proposed Rulemaking*, FCC 03-62, CG Docket No. 02-278 (Released March 25, 2003). Initial comments were due filed on or before May 5, 2003, and reply comments are due filed by May 19, 2003.

1. the Do-Not-Call registry should not preempt state Do Not Call registry laws; instead, state and federal authorities should be able to share registry information and determine how best to prosecute any alleged infractions;
2. consumers should be able to register once by contacting either the FCC, the FTC or the state's Do Not Call registry (the registries would share databases), and file a complaint with any of those agencies;
3. there should be consumer education that registration on the FTC's national Do Not Call registry is free and that Congress has appropriated funds for the implementation of the national Do Not Call registry.

The initial comments on behalf of several businesses and that of consumer protection advocates draw direct focus on the balance the FCC needs to achieve in order to implement an effective Do-Not-Call registry.

On the one hand, some telemarketing businesses claim that company specific Do-Not-Call lists – as previously permitted by federal law – provide sufficient consumer protection. They assert that consumers can obtain devices and services to screen calls or simply hang up.² Other businesses submit that the business exemptions of the FTC (i.e. calls to businesses, calls in which no sale is final without a face-to-face meeting, as well as exempt industries – banks, insurance companies, and financial advisors) need to be carried through to the Do-Not-Call Act; otherwise exempt activities such as calls to existing customers would violate the Act.³ Similarly, some claim that referrals by existing customers should not be subject to the Act.⁴ On the other hand, consumer advocates urge for consistency between the scope and definitional differences of the FTC rules and the FCC's TCPA rules.⁵ For example, NASUCA urges the Commission to adopt the FTC definition of “established business relationship” and remove the established business relationship exemption from the prohibition on making calls by artificial or recorded voice to residential consumers, as well as retention of the FTC requirement that company specific Do-Not-Call lists be maintained for 10 years.⁶

² Comment, dated April 29, 2003 for Progressive Business Publications, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Further Notice of Proposed Rulemaking*, FCC 03-62, CG Docket No. 02-278.

³ Comment, dated May 2, 2003 for National Association of Insurance and Financial Advisors, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Further Notice of Proposed Rulemaking*, FCC 03-62, CG Docket No. 02-278

⁴ *Id.*

⁵ Comment, dated May 5, 2003 for the National Association of State Utility Consumer Advocates, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Further Notice of Proposed Rulemaking*, FCC 03-62, CG Docket No. 02-278.

⁶ *Id.*

The Ratepayer Advocate submits that the true focus on implementation of the Act should be on residential consumers and their desire to be protected from unwanted telephone solicitations. In this regard it is understood that businesses do not require the same protection; indeed, businesses may desire and agree to receive unsolicited proposals as part of their ordinary business. Residential consumers, however, do not so desire. Therefore, it is crucial that the broadest scope of protection be afforded by the Act. Consistency between the TCPA and the FTC rules on telemarketing must be achieved in order that the Act provide its intended protection to residential consumers. Additionally, the Act should not be preemptive of state laws designed to protect its residential consumer citizens from the undesired intrusion of telemarketers.

The Ratepayer Advocate therefore, submits that:

1. First, contrary to some commenters, consumers should not have to invest in additional equipment or services to protect themselves from unwanted telephone solicitations.
2. Second, definitional consistency between the FTC rules and TCPA regulations is paramount. The exception for calls to existing customers should not provide an open door for all other types of calls that are generated. In this regard, the proposal to exempt referrals (“referral exemption”) by existing customers presents a mere end-run on the protections the Act intends to provide as the element of consent to receive such calls is missing. Therefore, the FCC should not adopt a referral exemption.
3. Third, extend the prohibition on artificial or prerecorded calls, placed to residential customers, to companies presently exempt under the “established business relationship” exception and thereby require companies to make live calls enabling residential customers to accept or decline further calls.
4. Fifth, in a properly implemented national Do-Not-Call registry environment, the necessity for company specific Do-Not-Call lists is obviated. The national registry data should prevail where there is conflict between company specific list data and the national registry. Companies should not be absolved under the Act for calls made to residential consumers based on their company specific list when the consumer’s name is on the national registry.

The right of residential consumers to keep unsolicited telemarketing calls from disturbing the peace and enjoyment of their homes must be zealously guarded. However, the FCC should not preempt state laws that provide similar or greater consumer protections.⁷ Accordingly, the Ratepayer Advocate submits that proper implementation of the Act requires additional provisions to conform the FTC telemarketing rules to the

⁷ *Id.* at fn. 3.

intent of the Act, and such provisions should clearly state that establishment of the national Do-Not-Call registry will not preempt state Do-Not-Call laws.⁸

Respectfully Submitted,

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⁸ See, 47 U.S.C. § 227(e)(1) which provides that the TCPA shall not preempt any state law that imposes more restrictive intrastate requirements.